IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 87 OF 2006
IN
CHAMBER SUMMONS NO. 1254 OF 2003
IN
PETITION NO. 577 OF 2001
IN
SUIT NO. 20 OF 2002

Mrs. Roshan Sam Dastoor.] .. Ori.Petnr. (since deceased)

Daryus Soley Panthakey] .. Appellant (Ori.Applicant.

Versus

1. Dr. Adi Homyar Dastoor & 2 ors.] .. Respondents (Ori.Respdts.)

Mr. Sanjay Jain i/b Mr. Vinod Thakkar for the appellant.

Mr. R.D. Suryavanshi for the respondents No.1, 3.

CORAM: R.M. LODHA &
ANOOP V. MOHTA, JJ.

DATED: 17TH FEBRUARY, 2006

P.C. :

. Heard Mr. Sanjay Jain, the learned counsel for the appellant and Mr. R.D. Suryavanshi, the learned counsel for the respondents.

2. Admit.

3. The learned counsel for the respondents waive service. Printing of Paper Book is dispensed with. By consent, Appeal is heard finally at this stage.

4. In paragraph 5 of the impugned order, the learned Chamber Judge has observed thus:

> "5. In my opinion the Chamber Summons cannot be granted. It is for this reason that the applicant is seeking to be the petitioner in the present petition. Admittedly he is not the legal heir and representative of the said deceased Roshan S. Dastoor or of Hilla Homyar Dastur. His claim arises out of the will of Roshan S. Dastur and the same is not yet protected. In view thereof the present chamber summons can not be granted at this stage. I however passed an order that the present chamber summons to be heard alongwith the probate petition filed by the applicant of Roshan Dastoor. If he succeeds in the said petition and obtains probate he will be entitled to prosecute the present petition. With the aforesaid directions chamber summons disposed of."

5. We find that paragraph 5 makes some inconsistent observations. On the one hand, the learned Chamber Judge records that the Chamber Summons cannot be granted and on the other, he records that the present Chamber Summons shall be heard along with Probate Petition filed by the present appellant seeking probate of the Will executed by the original petitioner Roshan Sam Dastoor. We clarify that we have read the sentence, "I however passed an order that the present chamber

summons to be heard alongwith the probate petition filed by the applicant of Roshan Dastur" to mean that the Chamber Summons taken out by the present appellants has been ordered to be heard alongwith Probate Petition that has been filed by the present appellant seeking probate of the Will of Roshan Dastoor.

6. We are informed by Mr. Sanjay Jain, the learned counsel for the appellant that by the judgment and order dated 20th October, 2005, the Probate Petition filed by the present appellant seeking probate of the Will of Roshan S. Dastoor has been granted in his favour. The learned counsel for the respondents submits that by Miscellaneous Petition (Lodg.) No.1027 of 2005, the prayer for setting aside the said judgment and order has been made.

7. The fact of the matter is that the Probate Petition filed by the appellant seeking probate of the Will of Roshan S. Dastoor has been granted on 20th October, 2005. Merely because the said order has been sought to be set aside by the respondents by making an application, that would not justify the appellant not being substituted in Suit No.20 of 2002 in Petition No.577 of 2001 in place of Mrs. Roshan Sam Dastoor.

8. We accordingly allow the Appeal and modify the order dated 8th July, 2005, passed by the learned Chamber Judge. Chamber Summons No.1254 of 2003 taken out by the appellant is granted and the appellant is ordered to be substituted in place of Mrs. Roshan S. Dastoor in the aforesaid proceedings and pursue the proceedings accordingly. Necessary amendment in the Suit No.20 of 2002 shall be made by the appellant within four weeks from today.

9. Appeal stands disposed of. No costs.

Sd/-
[R.M. LODHA, J.]

Sd/-
[ANOOP V. MOHTA, J.]

[srpasha@hc]